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Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Science Applications International Corporation**
 Under Solicitation No. DRFAWA-11-R-ETASS

Docket No.: **12-ODRA-00606**

Appearances:

For the Protester: Shelly L. Ewald, Esq.; Scott P. Fitzsimmons, Esq.;
 and Brian R. Dugdale, Esq. of Watt, Tieder, Hoffar
 & Fitzgerald, LLC

For the FAA Program Office: Chin Pann, Esq.

For the Intervenor (TASC): Thomas P. Barletta, Esq.; Peter L. Wellington, Esq.;
 Anthony Rapa, Esq.; and Michael J. Navarre, Esq.,
 of Steptoe & Johnson, LLC

For the Intervenor (SRA) John A. Howell, Esq. and Rebecca Bailey Jacobsen,
 Esq., of Halloran & Sage, LLC

Science Applications International Corporation (“SAIC”) filed a post-award protest with the Office of Dispute Resolution for Acquisition (“ODRA”) on May 7, 2012, and a supplemental protest on June 11, 2012 (collectively, the “Protest”). The Protest arises under Solicitation No. DRFAWA-11-R-ETASS (the “Solicitation” or “SIR”) for en route technical assistance support services (“ETASS”). SAIC challenges the separate contract awards made to TASC, Inc. (“TASC”) and Science Research and Applications International, Inc. (“SRA”) pursuant to the Solicitation. The Protest originally involved several issues relating to both the technical evaluation and the cost/price evaluation. Mediation efforts between the FAA Product Team (“Product Team”) and SAIC, however, have reduced the Protest to two grounds. Specifically, SAIC asserts that:

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- (1) The FAA improperly reduced SRA's proposed price by removing a "subcontractor profit" that was not presented in SRA's proposal or identified in SRA's response to the FAA's clarification requests as "fixed fee." As a result of the FAA's unilateral actions, SRA's cost proposal was wrongfully adjusted downward more than \$[DELETED]. As a result, SRA's proposal was more than \$[DELETED] lower than SAIC's and, therefore, improperly found to be more financially beneficial to the government; and
- (2) The FAA wrongfully accepted a non-compliant proposal from TASC that violated the costs-plus-percentage-of-cost prohibition. In its proposal, TASC stated that it would charge the FAA [DELETED] [.]. Yet, during clarifications, the FAA concluded that TASC would charge its "actual costs" [DELETED], despite no such proposal revision by TASC.

SAIC Letter of July 19, 2012.

As discussed more fully below, the ODRA finds that the Product Team did not improperly reduce SRA's price, and did not accept an improper cost-plus-percentage of cost proposal from TASC. The ODRA therefore finds the Protest to be meritless, and recommends that the it be denied in its entirety.

I. Findings of Fact

A. The Solicitation

1. The Product Team issued the Solicitation on January 4, 2011. *Agency Response* ("AR") Tab 1 at 3. The Product Team amended the Solicitation seven times, with the last amendment issued on November 17, 2011. *AR* Tab 43; *Initial Protest*, Ex. 1.¹
2. Whereas amendment seven, consisting of only two pages, simply extended the anticipated award date from November 2011 to January 2012 (*AR* Tab 43),

¹ The record is replete with duplicative exhibits from the parties. The ODRA appreciates the parties' diligence in providing complete submissions under the Rules. For the sake of brevity, however, the ODRA will limit its citations to only the Agency Response tabs. The Agency Response is the more extensive collection, whereas SAIC's exhibits are fewer in number, and spread over three separate filings (i.e., the Protest, the Supplemental Protest, and SAIC's Comments).

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amendment six made numerous changes to the Solicitation, and was provided to offerors in both a “redline” version that showed changes and a “clean” version with just the revised text. AR Tabs 13 and 14. Amendment seven had an effective date of July 22, 2011, and required proposals to be submitted by August 12, 2011. AR Tab 14, at 2-3.

3. The Solicitation, as amended, explained that the Product Team anticipated the contract would be a cost-plus-fixed-fee, level of effort, task order, term contract type. AR Tab 14, § B.1. The Solicitation called for a 36-month base period, followed by two consecutive option periods of 24 months each. *Id.* at § B.9.
4. Given that the Protest challenges the cost evaluations of two awardees, a detailed description of the services purchased is not necessary. Nevertheless, as background, the Solicitation provided the following summary:

B.4 SUMMARY DESCRIPTION OF SERVICES

This contract provides for engineering professional and technical support services in support of the FAA existing and future National Airspace System (NAS) initiatives. The statement of work delineated in Section C.3 is representative of the type of services to be provided under this contract. Hence forth [sic], the Contractor staff is expected to provide all management, supervision, labor, facilities, equipment, material supplies, and services (except as may be expressly set forth in this contract as furnished by the Government) and otherwise do all things necessary for, or incident to, the performance of the requirements set forth in Section C of the contract, as incrementally requested and authorized in the form of individually issued Task Assignments. ...

AR Tab 14, § B.4.

5. Section I of the Solicitation incorporated by reference *AMS Clause* 3.2.4-5, “Allowable Cost and Payment (April 2001).” AR Tab 14, at § I.1.

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6. Section L of the Solicitation provided explicit instructions to offerors with regard to the layout and presentation of proposals. It dictated that all “cost/price” information was to be contained in Volume IV. AR Tab 14, § L.16.7.
7. The Solicitation required offerors to use prescribed spreadsheets, Attachments L009 to L014, to create their cost exhibits. AR Tab 14, § L.16.7.10. A table in the Solicitation summarized these spreadsheets as follows:

Summary of Cost Exhibits

Section L – Attachment L009	Proposed Cost/Price by Element of Cost, Year, and Contract Term
Section L – Attachment L010	Proposed Direct Labor Hours, Rates and Costs
Section L – Attachment L011	Development of Direct Labor Rates for First Year of Contract
Section L – Attachment L012	Indirect Expense Schedules
Section L – Attachment L013	Summary of Offeror’s Government Audit Information and Disclosure Statement
Section L – Attachment L014	Proposed Summary of Offeror’s Loaded Direct Labor Rates Ceiling

AR Tab 14, § L.16.7.10. Each offeror was permitted to “revise the format of the cost exhibits L009-L014 to include all of its elements of cost.” *Id.*

8. Separate cost narratives and associated exhibits L009—L014 were also required of every subcontractor “proposed at \$500,000 or greater.” AR Tab 14, § L.16.7.18. The Solicitation permitted potential subcontractors to provide proprietary information “directly to the FAA in sealed packages appropriately marked.” *Id.* The Solicitation required further,

For the prime contractor only, the elements identified as subcontractor costs must exactly match the bottom lines from Section L-Attachment L009, Proposed Cost/Price by Element of Cost, Year, and Contract Term submitted by the subcontractor.

Id. at § L.16.7.11.

9. The Solicitation imposed several “Mandated FAA Assumptions/Limitations for Offeror Pricing.” AR Tab 14, § L.16.7.1. As discussed more fully below, these included assumptions for both direct labor and “Material / Other Direct Costs”

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(“material / ODC”). *Id.* at §§ L.16.7.5 (direct labor) and L.16.7.8 (material / ODC). The Solicitation further emphasized in bordered language:

Mandated FAA Assumptions/Limitations for Offeror Pricing

In order to promote fair and consistent pricing of this procurement, Offerors must reflect all FAA directed assumptions/limitations in their cost proposals. Failure to comply with these assumptions may result in the determination that the proposal is non-responsive to the SIR and may be grounds for rejection of the proposal.

Id. at § L.16.7.1 (underline and italics added).

10. One of the required assumptions included the use of detailed labor categories, each with a fixed number of hours, spanning the seven possible years of contract performance. These were prescribed in Attachment L005, and the Solicitation required that each “offeror must utilize these hours for bid purposes.” AR Tab 14, § L.16.7.5. As further clarification, the Solicitation explained that the Product Team [DELETED]. Specifically, it stated:

[DELETED]

AR Tab 14, § [DELETED] (emphasis added); *see also* § [DELETED]. Thus, offerors that [DELETED]. AR Tab 14, § [DELETED].

11. Similar to the direct labor assumptions, the Solicitation also prescribed a [DELETED]. AR Tab 14, § [DELETED]. [DELETED]*Id.* As with the direct labor assumptions, [DELETED]. *Id.*
12. Section M of the Solicitation provided that the “total price for the Base and Options Periods will be added together to establish the Offeror’s total proposed price for evaluation (excluding fee).” AR Tab 14, § M.2.3.

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B. SRA's Proposal and its Evaluation

13. SRA's proposal included information about a proposed subcontractor, NATS (USA), Inc. ("NATS"). AR Tab 15, at 201-214.² As required by the Solicitation, SRA's proposal included its own Cost Exhibit L-009, and "sanitized" (i.e., not containing proprietary information) exhibits for subcontractors, including NATS. *Id.* at 2 (SRA), 210 (NATS (United States)), and 213 (NATS (United Kingdom)). The proposed NATS subcontract was to be a Time and Materials ("T&M") contract, and the sanitized versions of its L-009 submissions represented the "Proposed Fixed Fee Percentage" in monetary terms as "\$0.00." *Id.* at 210 and 213. The same bottom-line figures found in the sanitized NATS exhibits appeared in the corresponding line relating to NATS found in the SRA Exhibit L-009. *Compare* AR Tab 15, at 2, *with* Tab 15, at 210 and 213.
14. As permitted by the Solicitation, NATS also provided directly to the Product Team a sealed version of its cost exhibits. AR Tab 26. The NATS narrative explained that "NATS has proposed Time and Materials rates which are set to include profit and risk." *Id.* at Narrative, page 5. Unlike the sanitized version of exhibit L-009 described in FF 13, above, the unsanitized version from NATS set forth specific dollar amounts of \$[DELETED] for United Kingdom ("UK") operations and \$[DELETED] for United States ("US") operations in the lines for "Proposed Fixed Fee Percentage." AR Tab 26, at US and UK Exhibits L-009. Labor costs, in turn, were reduced, but the final "Total Price" figures on both the unsanitized documents and the sanitized documents, were identical. *Compare* AR Tab 15, at 210 and 213, *with* AR Tab 26, at US and UK Exhibits L-009.
15. NATS was not the only subcontractor proposed on a T&M basis. As summarized by the Contracting Officer, nine offerors proposed a total of 75 subcontractors, including 53 subcontractors on a T&M basis. AR Tab 57, *Contracting Officer*

² AR Tab 15 contains Volume VI of SRA's proposal, and includes a table of contents of the exhibit. While the actual page numbers do not appear in the electronic version of the document provided to the ODRA, the page numbers used in this and other pin-citations are based on the page references found in the Table of Contents of the exhibit.

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Decl. at 6. NATS, however, was the only proposed T&M subcontractor that did not disclose to its prime contractor the rate(s) charged for profit within the T&M pricing. *Id.*

16. The Contracting Officer explained how all proposed T&M subcontracts were evaluated:

[F]or purposes of the ETASS competition, the evaluations of cost proposals were conducted excluding the fee or profit of each prime offeror and all of their subcontractors. This included excluding for evaluation purposes the fee on cost reimbursable contracts and the profit contained in Time and Material (T&M) labor rates proposed on T&M contracts.

AR Tab 57, Contracting Officer Decl. at 4.

17. The Cost Evaluation Team (“CET”) used the approach described by the Contracting Officer when it evaluated the proposed subcontract between NATS and SRA. *AR Tab 54*, at 38. The “Phase II Cost Evaluation Report” explains:

The CET notes in [SRA]’s response to the government’s clarification on 28 December 2011, the same amount of \$[DELETED] was submitted again showing to excluding [sic] fee for all its subcontractors with the exception of NA[TS], which still included fee. The CET confirmed in the sealed subcontractor proposal submission dated 12 August 2011 that the amount of \$[DELETED] is Subcontractor’s price including fee, subcontractor 9 - NA[TS]’s price excluding fee was calculated at \$[DELETED], subcontractor NA[TS] is showing a fee amount of \$[DELETED]. In accordance to Section M5.2.3, the CET removed the fee of \$[DELETED]³ for [SRA] subcontractor 9 – NA[TS], thus reducing [SRA]’s subcontractor proposed amount from \$[DELETED] to \$[DELETED]. The reduction in [SRA]’s subcontractor proposed amount is consistent with section M.5.2.3 and will not be calculated as a probable cost to the government.

Id. The CET further explained that SRA’s charges for handling subcontractor administration should not have applied to the NATS fee, which reduced the evaluated cost further by \$[DELETED]. Together, these two reductions relating

³ This figure correctly represents the sum of the fixed fee amounts indicated in the NATS’ unsanitized proposal. *See* FF 14, *supra*.

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to the proposed subcontract between NATS and SRA add up to \$[DELETED]. AR Tab 54, at 8 and 40.

18. As a result of the CET's recognition that SRA's proposal was based on the sanitized data it received from NATS rather than the unsanitized data provided directly to the Product Team, the CET removed a total of \$[DELETED] from SRA's costs for subcontractor labor and prime contractor administration expenses. The CET's final evaluated cost to the Government of the SRA proposal was \$[DELETED], including various adjustments, and excluding any fees and profit for prime and subcontractors. AR Tab 54, at 39. The CET, for evaluation purposes, also adjusted SRA's "Total Proposed Price" (i.e., SRA's proposed costs excluding fees)⁴ by the same \$[DELETED], thereby reducing it from \$[DELETED] to \$[DELETED]. AR Tab 54, at 8.

B. TASC's Proposal and its Evaluation

19. TASC included within its cost proposal [DELETED], which is the subject of SAIC's challenge to the award to TASC. AR Tab 16, Volume VI, Chapter 1, at 1-4; *SAIC Letter* of July 19, 2012 (*quoted supra* p. 2).
20. TASC's proposal explained that it provided the PSC line item in response to the directions in the Solicitation found in sections L.16.7.8, L.16.7.12 and L.16.7.20 of the Solicitation, discussed *supra* at FF 10 and 11. AR Tab 16, *TASC Proposal*, Volume VI at 3-15. It further summarized the PSC as follows:

⁴ The ODRA notes that the Solicitation and the evaluation documents repeatedly use the terms "cost/price," "cost," and "price" without precision. As the Acquisition Management System Policy states:

"Cost" is the contractor's expenses of contract performance, either estimated or actual.

...

"Price" equals cost plus any fee or profit involved in the procurement of a product or service.

Acquisition Management System Policy, Appendix C: Definitions. Mindful of the important distinction between "cost" and "price," the ODRA has reviewed the *Phase II Cost Evaluation Report* (AR Tab 54) and other documents in the record by considering the substance and mathematical mechanics, and has not uncritically accepted the language used in these documents.

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... As disclosed to DCAA, TASC's [DELETED] described above. Therefore, in order to be compliant with our disclosed practices as well as the ETASS SIR, we have chosen [DELETED] basis to capture [DELETED]. We refer to this [DELETED]. TASC believes that making the [DELETED] that will be [DELETED] ETASS program will enable the FAA to [DELETED].

AR Tab 16, TASC Proposal, Volume VI at 3-16. TASC presented its [DELETED] an estimated amount of \$[DELETED] (assuming [DELETED]). AR Tab 16, TASC Proposal, Volume VI at 3-16 and 3-17.

21. By letter dated January 6, 2012, the Contracting Officer cited TASC's [DELETED] when he raised the concern that it is "indicative of a cost-plus-percentage-of-cost" arrangement "since the pre-determined [DELETED] is applied to actual performance costs." AR Tab 51. The purpose of the letter was to "ensure that the Product Team correctly understood how TASC's proposed [DELETED] would work." AR Tab 57, *Contracting Officer Decl.* at 3.

22. TASC replied by letter on the same day, January 6, 2012. *SAIC Comments*, Ex. G. In the letter, TASC reiterated that the purpose of the [DELETED] is to [DELETED], as permitted by Solicitation sections [DELETED] and [DELETED]. *Id.* at 2. TASC pointed to a portion of its proposal that "stated clearly that its actual proposed [DELETED] were \$[DELETED]." *Id.* (citing TASC Cost Exhibit L009).⁵ TASC elaborated further:

TASC offered a [DELETED] solely as a convenient method for [DELETED] TASC's actual costs, which are detailed in TASC's Proposal.

Thus, without regard to the [DELETED][,] TASC proposed an actual cost amount for the [DELETED] and provided the Government all of the detailed cost data it needs to conduct a full cost analysis of TASC's proposal for the [DELETED]. This includes a breakdown of the hours by labor category for each labor category in the [DELETED] and the estimated [DELETED] by year.

⁵ The document TASC cited is found at AR Tab 16, Volume VI, Chapter 1, at 1-4.

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Note also that in TASC's reference to a [DELETED] should the [DELETED] TASC made clear that it was offering [DELETED] based solely on TASC's actual costs.

SAIC Comments, Ex. G, at 2.

23. On the following Monday, January 9, 2012, the Contracting Officer asked TASC representatives to a meeting to discuss the [DELETED]. *AR Tab 57, Contracting Officer Decl.* at 3. The Contracting Officer elaborated further:

TASC obliged and at that meeting was [sic] myself and the Source Evaluation Board Member Gary Perusse for the FAA and Agnes Kelly, Scott Albrecht, and Julia Donley for TASC. At that meeting I simply asked TASC what its intent was behind the [DELETED] and TASC confirmed to us that it only intended to recover its actual costs. I then requested that TASC confirm this in writing, which they did by email to me later that day.

Based upon these communications with TASC, I was comfortable that TASC was not proposing a cost-plus-percentage-of-cost type vehicle because TASC was only looking to recover its actual cost. I was satisfied that the [DELETED] would work in a similar fashion as [DELETED] and that while TASC might initially bill the [DELETED] as appropriate, that the [DELETED] would be subject to [DELETED] consistent with the SIR in Section G.II and the incorporated AMS clause 3.2.4-5. In exploring further the basis of TASC's estimate, I emailed TASC on January 12, 2012 and asked it to provide its estimate of [DELETED] under the SIR. TASC responded to my request by emailed letter on January 13, 2012 and provided the requested detail on their estimated [DELETED].

Id. The email from TASC dated January 9, 2012, referenced in the first paragraph above, stated simply, "As an additional clarification to our letter on Friday, it is TASC's intent to receive reimbursement for its actual [DELETED] incurred."

SAIC Comments, Ex. N.

D. Award and Protest

24. The Phase II evaluation yielded final total proposed costs, without fee, for SRA of \$[DELETED], and \$[DELETED] for TASC. *AR Tab 55*, at 25. SAIC's final total proposed costs, without fee, was \$[DELETED]. *Id.*

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25. As to the technical evaluation, TASC received an overall consensus score of [DELETED], with low risk in all areas assessed. *AR* Tab 46, at 47. SRA also received an overall consensus score of [DELETED], with low risk in all areas assessed. *Id.* at 43. The Protester, SAIC, received an overall consensus score of [DELETED], with low risk in all areas assessed. *Id.* at 40.
26. The Source Selection Evaluation Board (“SSEB”) recommended awards to TASC and SRA, which had the “[DELETED] of all the offerors.” *AR* Tab 55, at 25. The SSEB did not recommend award to SAIC because it “did not find there were sufficient benefits contained in the SAIC proposal to warrant the additional cost to the Agency.” *Id.*
27. The Source Selection Official accepted the SSEB’s recommendation, and awarded the unrestricted competition contracts to TASC and SRA. *AR* Tab 56, at 2.
28. SAIC received a debriefing on May 1, 2012, and filed this Protest on May 7, 2012. *Protest* at 1. Both SRA and TASC intervened without objection and were admitted to the Protest. *ODRA Status Conference Memorandum* of May 11, 2012.
29. As part of a voluntary ADR process, SAIC received nonredacted evaluation documents, and filed a supplemental protest on June 11, 2012. *Supplemental Protest* at 1.
30. On July 19, 2012, SAIC informed the ODRA that:
- [A]ll potential efforts to resolve SAIC’s protest in mediation with the FAA have been exhausted. ... Indeed, as a result of [the mediator’s] efforts, the FAA and SAIC have resolved several of SAIC’s grounds for protest. The parties, however, have reached an impasse regarding two issues identified in SAIC’s initial and supplemental protests.

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SAIC Letter of July 19, 2012, at 1. The letter further refined the remaining issues as:

- (1) The FAA improperly reduced SRA's proposed price by removing a "subcontractor profit" that was not presented in SRA's proposal or identified in SRA's response to the FAA's clarification requests as "fixed fee." As a result of the FAA's unilateral actions, SRA's cost proposal was wrongfully adjusted downward more than \$[DELETED]. As a result, SRA's proposal was more than \$[DELETED] lower than SAIC's and, therefore, improperly found to be more financially beneficial to the government; and
- (2) The FAA wrongfully accepted a non-compliant proposal from TASC that violated the costs-plus-percentage-of-cost prohibition. In its proposal, TASC stated that it would charge the FAA a "[DELETED]." Yet, during clarifications, the FAA concluded that TASC would charge its "actual costs" for [DELETED], despite no such proposal revision by TASC.

SAIC Letter of July 19, 2012.

31. Based on SAIC's indication that only two issues remained unresolved, the ODRA directed the Product Team to prepare an Agency Response to those issues, to be followed by Comments from the SAIC and the Intervenors. *ODRA Letter* of July 20, 2012.

32. The Agency Response and subsequent Comments from all parties were filed in a timely manner, and the record closed on August 21, 2012. *ODRA Letter* of August 21, 2012.

II. Burden and Standard of Proof

The Protester in this matter, SAIC, bears the burden of proof, and must demonstrate by substantial evidence (i.e., by the preponderance of the evidence), that the designated evaluation and source selection officials failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). 14 C.F.R. § 17.21(m) (2012); *Protest of Adsystech, Inc.*, 09-ODRA-00508. Under the AMS, source selection decisions must be supported by a "rational basis," and may not be arbitrary, capricious, or an abuse of

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discretion. 14 C.F.R. § 17.21(m) (2012); *AMS Policy* 3.2.2.3.1.2.5. The ODRA will not substitute its judgment for that of the “designated evaluation and source selection officials as long as the record demonstrates that their decisions had a rational basis, were consistent otherwise with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation.” *Adsystech, supra* (citing *Protest of Ribeiro Construction Co., Inc.*, 08-TSA-031).

III. Discussion

A. The Evaluation of the NATS Proposal was Consistent with the Solicitation

SAIC’s argues that the Product Team improperly treated \$[DELETED] of the SRA proposal as fixed-fee associated with SRA’s T&M subcontractor, NATS, and that this treatment caused SRA’s evaluated cost/price proposal to be less than that of SAIC. *SAIC Comments*, at 1. According to SAIC, the deduction was an “improper assumption” because SRA itself did not identify the amount as fixed-fee. *Id.* at 6. SAIC argues that had the evaluators not made this assumption, then SAIC’s evaluated costs would have been lower than SRA’s, and resulted most likely in an award to SRA. *Id.* at 6-9.

The ODRA recommends that this ground of the Protest be denied. As examined more fully below, the record reveals that: (1) SRA’s proposal complied with the instructions found in section L of the Solicitation, (2) NATS provided full disclosure of its pricing using procedures established by the Solicitation; and (3) the Product Team’s reduction was entirely consistent with the treatment of similarly situated T&M subcontractors proposed by other prime offerors.

The Solicitation required SRA’s Cost Exhibit L-009 to match those provided by their subcontractors. FF 8. SRA’s proposal met this requirement with the information SRA had in its possession, i.e., the sanitized subcontract proposal from NATS, which did not breakout as a separate amount the profit rates or fee incorporated into the NATS T&M labor rates. FF 13. As a result, SRA, in both its proposal and its response to clarification

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correspondence of December 28, 2011, truthfully did not (and could not) segregate or remove sums for unknown profit or fee charges by NATS. FF 17.

The Product Team, by contrast, had more information than SRA with regards to the NATS cost and fee figures. FF 13. NATS clearly defined its “proposed fixed fee” in its unsanitized cost proposal submitted directly to the Product Team in accordance with the optional procedure established in the Solicitation. *Id.* This clear statement of the profit was not, as SAIC argues, an “improper assumption;” it was concrete information submitted by a subcontractor supporting SRA’s proposal.

Given the information provided collectively by SRA and NATS to the evaluators, the ODRA cannot find fault with the evaluation. To the contrary, the ODRA finds that the Product Team fulfilled its obligations to evaluate the proposal in accordance with the Solicitation, to consider the whole proposal, and to avoid disparate treatment of offerors. On this first point, Solicitation § M.2.3 required the cost evaluation to be conducted in a manner that excluded fee. FF 12. Accepted cost analysis procedures for T&M contracts (which technically do not involve a “fee”) treat profit as fee for analysis. *See AMS Pricing Handbook* (January 2012), at 12-2.⁶ Consistent with these authorities, the Product Team identified the profit and associated prime contractor mark-ups to calculate the \$[DELETED] deduction. FFs 17 and 18. The ODRA does not fault the Product Team for considering all information in the proposal, including the unsanitized NATS document, since the information was contained in the specified or logical location in SRA’s overall proposal. *See Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490 (protest sustained where evaluators ignored logically placed information). Moreover, had the Product Team ignored the unsanitized figures from NATS and failed

⁶ The *AMS Pricing Handbook* explains:

Labor-hour and time and material contracts represent hybrid arrangements. The term profit is associated with these hybrid arrangements, but the cost risk assumed by a contractor is low, much like that assumed under cost reimbursement contracts. Therefore, profit is evaluated like fee in structured analysis approaches applied to labor-hour contracts and time and material contracts.

AMS Pricing Handbook (January 2012), at 12-2.

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to remove the stated profit in the T&M pricing, it would have been subject to possible protests for having evaluated the NATS/SRA combination “by demonstrably different standards in a materially and prejudicially different manner” than 52 other proposed combinations of prime offers with T&M subcontractors. FF 15; *see Protest of Apptis, Inc.*, 10-ODRA-00535. The ODRA therefore recommends that the Protest of the award to SRA be denied.

B. The Contracting Officer had a Rational Basis to Conclude that TASC did not Offer a Cost-Plus-Percentage-of-Cost Contract

As shown in the Findings of Fact, TASC’s [DELETED] caused the Contracting Officer concern because facially it could be interpreted as creating a cost-plus-percentage-of-cost contract. FF 21. Although the record reveals that the Contracting Officer opened communications specifically to address this concern, SAIC charges that the subsequent communications did not support the conclusion that a CPPC contract was not being offered. *SAIC Comments* at 11-17. Further, apparently as alternative arguments, SAIC charges that the Contracting Officer impermissibly allowed TASC to modify its proposal, and that TASC misrepresented that the Defense Contract Audit Agency (“DCAA”) had reviewed and accepted its [DELETED]. *Id.* at 15-16. These allegations lack merit.

1. CPPC Contracts are Prohibited by the AMS

Although the FAA is not bound by the statutory prohibition against CPPC contracts,⁷ long-standing FAA policy FAA prohibits their use and was in place when the Solicitation was issued. *AMS Policy* § 3.2.4.2 (October 2010); FF 1. In accord with other federal contract forums, the ODRA:

[A]ccept[s], at the outset, the general criteria (adopted by the [Armed Services] Board [of Contract Appeals]) which were developed by the Comptroller General for determining whether a contract is a cost-plus-a-percentage-of-cost contract: (1) payment is on a predetermined percentage rate; (2) the predetermined percentage rate is applied to

⁷ The general statutory prohibition against CPPC contracts is found in the Title III of the Federal Property and Administrative Services Act of 1949, previously codified at 41 U.S.C. § 254(b) (2006). It is now found at 41 U.S.C. § 3905(b) (Supp. V 2011), as recodified by Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3776. The FAA is exempt from this provision as a result of 49 U.S.C. § 40110(d)(2)(A) (Supp. V 2011).

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actual performance costs; (3) the contractor's entitlement is uncertain at the time of contracting and (4) the contractor's entitlement increases commensurately with increased performance costs. 55 Comp.Gen. 554, 562 (1975). These standards incorporate the common understanding of the “cost-plus-a-percentage-of-cost system of contracting,” an understanding which was undoubtedly in Congress's mind when it enacted the prohibition.

Urban Data Systems, Inc. v. United States, 699 F.2d 1147, 1150 -1151 (Fed. Cir. 1983). It is recognized, however, that the use of [DELETED] for costs, which are subject to [DELETED], do not establish a CPPC contract. *See e.g.*, 35 Comp. Gen. 434, B-126794 (1956).

2. The Contracting Officer Rationally considered and Relied Upon Communications with TASC

SAIC posits that an offeror “simply cannot submit an illegal proposal,” and that “such a submission ... must be rejected by the FAA.” *SAIC Comments* at 15. Rejecting a proposal, however, is a matter of rationally exercised business judgment. To support such business judgment with adequate information, the Acquisition Management System (“AMS”) Policy advises that “communications ... should take place throughout the source selection process,” and “information disclosed as a result of oral or written communication with an offeror may be considered in the evaluation of an offeror’s submittal(s).” *AMS Policy* 3.2.2.3.1.2.2 (October 2011). The AMS Policy further explains, “The purpose of communications is to ensure there are mutual understandings between the FAA and the offerors about all aspects of the procurement, including the offerors’ submittals/proposals.” *Id.* “The exercise of discretion in conducting communications must be consistent with fundamental AMS principles that promote sound business judgment, fairness and integrity.” *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514 (Findings and Recommendations (citing AMS Policy 3.1.3), *aff’d on recons.*, Decision on Request for Reconsideration, July 19, 2010). *AMS Policy* 3.2.2.3.1.2.2 (October 2011).

In the present Protest, TASC’s cost narrative and cost exhibits show both [DELETED] for [DELETED], and a total estimated cost of over \$[DELETED]. FF 20. The

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Contracting Officer cited TASC's [DELETED] for the [DELETED] when he raised the concern that it is "indicative of a cost-plus-percentage-of-cost" arrangement "since the pre-determined [DELETED] is applied to actual performance costs." FF 21. The purpose of the letter was to "ensure that the Product Team correctly understood how TASC's proposed [DELETED] would work." *Id.* While SAIC does not expressly challenge the decision to open communication with TASC on this item, the ODRA finds that the Contracting Officer had a rational basis to engage in communications given both the significance of a possible CPPC offer, and the importance of understanding TASC's intent.

Having opened communications, the next question is whether the Contracting Officer's interpretation of the exchange provided a rational basis for the determination that a CPPC was not being offered. The ODRA finds that the determination is supported by substantial evidence in the record, i.e., by correspondence and the Contracting Officer's Declaration. The correspondence in question, e.g., TASC's letter of January 6, 2012, indicated that the "[DELETED]" was provided "solely as a convenient method for [DELETED]." FF 22. Further, the email sent to the Contracting Officer after a meeting held on January 9, 2012, can be reasonably interpreted as an assurance that the [DELETED] was not a [DELETED] given that TASC's "intent" was "to receive reimbursement for its actual [DELETED] incurred." FF 23. According to his declaration, the Contracting Officer interpreted this correspondence and the oral communications as meaning that the "[DELETED] would be subject [DELETED] actual costs consistent with the SIR." FF 23. His declaration refers in particular to AMS Clause 3.2.4-5, "Allowable Cost and Payment (April 2001)," which was in the Solicitation. *Id.*; FF 5. That clause provides in part:

(g) Audit. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or underpayments.

AMS Clause 3.2.4-5, "Allowable Cost and Payment (April 2001)." The clause and the communications described above provide a rational basis for the conclusion that TASC's

[DELETED] was subject [DELETED] actual costs, and therefore did not establish a CPPC contract. While SAIC argues for other interpretations of the communications in question, “even *rational disagreement* between the parties nevertheless is a ‘mere disagreement’ that does not justify sustaining a protest.” *Protest of Apptis, Inc.*, 10-ODRA-00557.⁸

The ODRA therefore finds that the Contracting Officer had a rational basis to conclude that TASC was not offering a CPPC contract, and the ODRA recommends that this aspect of the Protest be denied.

3. TASC did not Benefit from a Second Bite at the Apple

SAIC argues that the communications over the [DELETED] offered TASC an improper “‘second bite’ at the apple.” *SAIC Comments* at 15. A “second bite of the apple,” refers to the prohibition in the AMS Policy and ODRA precedent against using communications to give offerors an improper and prejudicial opportunity to provide SIR-required information, correct deficiencies, decrease their price, rewrite substantial portions of their proposal, or otherwise improve their competitive standing. *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514 (Findings and Recommendations (citing AMS Policy 3.1.3), *aff’d on recons.*, Decision on Request for Reconsideration, July 19, 2010); *AMS Policy* 3.2.2.3.1.2.2 (October 2011).

The communications at issue in this Protest were for clarification purposes. As recognized in *Columbus, supra*, “The point at which communications turn into a ‘second bite of the apple’ necessarily is dependent on the circumstances.” The circumstances here reveal that TASC stated both its [DELETED], and its total estimated costs in its cost proposal. FF 20. Throughout the communication process, TASC never changed these crucial, basic figures. *Compare* FF 20 *with* FF 22. Instead, TASC’s letter of January 6,

⁸ While SAIC disagrees that the communications establish a mutual understanding that the [DELETED] would be [DELETED] under AMS Clause 3.2.4-5, TASC itself endorses the Product Team’s position. According to TASC, “any possible doubt on the subject was removed via the clarifications.” *TASC Comments* at 5. TASC further concedes that the Contracting Officer “reasonably concluded that TASC’s [DELETED]— *i.e.*, its [DELETED] would be subject to [DELETED] so that TASC recovers only its actual incurred [DELETED].” *Id.* at 7-9.

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2012 highlighted portions of its existing proposal to explain its intent. FF 22. The ODRA finds that these circumstances do not give rise to a second bite of the apple, and therefore recommends that this ground of the Protest be denied.

4. The Product Team was Not Misled with regard To TASC's [DELETED] and the [DELETED].

Based on a quote from TASC's proposal, SAIC asserts that TASC made a material misrepresentation regarding disclosure of its PSC rate to the DCAA. *Supplemental Protest* at 11-12; *SAIC Comments* at 16. The language in question (also set forth in FF 20) states:

As disclosed to DCAA, TASC's [DELETED] described above. Therefore, in order to be compliant with our disclosed practices as well as the ETASS SIR, we have chosen to [DELETED] **basis** to capture [DELETED]. We refer to this [DELETED] as the [DELETED]. TASC believes that making the [DELETED] that will be [DELETED] ETASS program will enable the FAA to [DELETED].

Supplemental Protest at 11 (citing the document found in AR Tab 16, TASC Proposal, Volume VI at 3-16) (emphasis added by SAIC). Relying on the language emphasized, SAIC argues that "TASC represented that its [DELETED] had been reviewed and accepted by the DCAA." *Supplemental Protest* at 11; *SAIC Comments* at 16.

The ODRA rejects SAIC's premise. The plain language of the quote, sans SAIC's emphasis, refers to disclosures of the [DELETED] themselves, not the [DELETED]. Furthermore, TASC's language characterizes the [DELETED] as a [DELETED] that "will be in effect" in the future. The ODRA finds, therefore, that TASC did not misrepresent or otherwise state that DCAA had "reviewed and accepted" the [DELETED]. The ODRA, accordingly, recommends that this ground of the Protest be denied.

IV. CONCLUSION

Based on the Findings of Fact and Discussion above, the ODRA recommends that the Protest be denied in its entirety.

_____/S/
John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/S/
Anthony N. Palladino
Director and Administrative Judge
FAA Office of Dispute Resolution for Acquisition